43/23

Office - Supreme Court, U.S.
FILED
SEP 26 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 375

THE AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,

against

UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON H. WHITE,
HERVEY C. ALLEN,
Counsel for Respondent,
27 William Street,
New York, N. Y.

BURLINGHAM, HUPPER & KENNEDY,
Of Counsel.

INDEX

	PAGE
STATEMENT	1
ARGUMENT	6
I. REASONS FOR DENIAL OF THE WRIT	6
(1) This is essentially a fact case	6
(2) There is no conflict between circuits	7
(3) Policy considerations are against allowance of the writ	8
II. THE PETITIONERS' QUESTIONS	9
(1) As to Question No. 1	9
(2) As to Question No. 2	11
(3) As to Question No. 3	12
CONCLUSION	13

AUTHORITIES

CASES:

A/S J. Ludwig Mowinckels Rederi v. *Accinanto, Ltd.*, 199 F. 2d 134 (4th Cir. 1952), *cert. den.*, 345 U. S. 992	10
Borcich v. *Ancich*, 191 F. 2d 392 (9th Cir. 1951), *cert. den.*, 342 U. S. 905 (1952)	12
Catalina, The, 95 F. 2d 283 (9th Cir. 1938)	12
Compania de Maderas de Caibarien, S. A. v. *The Queenstown Heights*, 220 F. 2d 120 (5th Cir. 1955)	7

PAGE

Consumers Import Co. v. *Kabushiki Kaisha (The Venice Maru)*, 320 U. S. 249 (1943)...7, 8, 9, 11
Coryell v. *Phipps*, 317 U. S. 406, 411 (1943).... 6

Denali, The, 105 F. 2d 413 (9th Cir. 1939), *reargued* 112 F. 2d 952 (1940), *cert. den.*, 311 U. S. 687..... 8

Earle & Stoddart v. *Wilson Line (The Galileo)*, 287 U. S. 420 (1932)..... 7, 10
Edmund Fanning, The, 201 F. 2d 281 (2nd Cir. 1953) 9

Galileo, The, 54 F. 2d 913 (2nd Cir. 1931), *aff'd sub nom. Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420 (1932)..... 7, 10
Globe and Rutgers Fire Ins. Co. v. *United States*, 105 F. 2d 160 (2nd Cir. 1939), *cert. den.*, 308 U. S. 611..... 10
Great Atlantic & Pacific Tea Co. v. *Brasileiro*, 159 F. 2d 661 (2nd Cir. 1947), *cert. den.*, 331 U. S. 836..... 9

Haroco Co., Inc. v. *The Tai Shan*, 111 F. Supp. 638 (S. D. N. Y. 1953), *aff'd on opinion below, sub nom. Frederick H. Cone & Co.* v. *The Tai Shan*, 218 F. 2d 822 (2nd Cir. 1955) 10, 11
Hines v. *Butler (The Virginia)*, 278 Fed. 877 (4th Cir. 1921), *affirming* 264 Fed. 986 (D. C. Md. 1920), *cert. den.*, 257 U. S. 659 ..... 8, 11
Hoskyn & Co. v. *Silver Line*, 143 F. 2d 462 (2nd Cir. 1944), *cert. den.*, 323 U. S. 767 ..... 8, 10

Ida, The, 75 F. 2d 278 (2nd Cir. 1935) 10

Just v. *Chambers, Executrix*, 312 U. S. 383 (1941) 6

Mabel, The, 35 F. 2d 731 (2nd Cir. 1929) 7

PAGE

May v. *Hamburg, etc., Gesellschaft*, 290 U. S. 333 (1933) 10

Pennsylvania, The, 19 Wall. 125 (1873) 6
Providence, etc., S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578 (1883) 9

Rio Gualeguay, The, 102 F. Supp. 861 (E. D. La. 1952), *aff'd*, 205 F. 2d 886 (5th Cir. 1953), *cert. den.*, 346 U. S. 915 ..... 8, 10

Salvore, The, 52 F. 2d 278, 285 (E. D. N. Y. 1931), *aff'd*, 60 F. 2d 683 (2nd Cir. 1932), *cert. den.*, 287 U. S. 653 6
Seaboard Tug & Barge v. *Rederi AB/Disa*, 213 F. 2d 772 (1st Cir. 1954) 7
Strathdon, The, 101 Fed. 600 (2nd Cir. 1900) .. 12

Texas & New Orleans Railroad Company, et al., v. *Brotherhood of Ry. & Steamship Clerks, et al.*, 281 U. S. 548, 558 (1930) 6

Umbria, The, 166 U. S. 404 (1897) 7

Venice Maru, The, 39 F. Supp, 349, 353 (S. D. N. Y. 1941), *aff'd*, 133 F. 2d 781 (2nd Cir. 1943), *aff'd sub nom. Consumers Import Co.* v. *Kabushiki Kaisha*, 320 U. S. 249 (1943)....7, 8, 9, 11

STATUTES:

Carriage of Goods by Sea Act [49 Stat. 1207, 1210 (1936), 46 U. S. C. § 1304(2)(b)]..... 6, 9

Fire Statute (R. S. § 4282, Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, 46 U. S. C. § 182)..6, 7, 8, 9, 10

Harter Act (27 Stat. 445 (1893), 46 U. S. C. §§ 190-195) 8, 10

Limitation of Liability Statute (R. S. § 4283, as amended, 46 U. S. C. § 183) 8

REGULATIONS: PAGE

Regulations of United States Coast Guard:

Explosives or Other Dangerous Articles on Board Vessels, Code of Federal Regulations Title 46:

Section 146.02-10 4

Section 146.02-12 5

Section 146.05-11 4

Section 146.05-15 4

Section 146.05-17 4

Section 146.22-100 Table E 3

IN THE

Supreme Court of the United States

October Term, 1955

No. 375

THE AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioners recite and refer in their argument to only such items of the evidence as they deem support their position and their recitals are in some respects not acceptable to the respondent nor were they to the Courts below. As the Court of Appeals said of petitioners' somewhat similar analysis of the record there, "that was not all the evidence" (App. A, 2a). Since the questions raised by petitioners are basically factual, it is necessary to review here in some detail the evidence upon which the Courts below must have rested their decisions.

1. The SHELL BAR, with a large number of small shipments on board, sailed from New York at 4:01 P. M. on May 1, 1948 on a relatively short voyage to Havana and

Central America (Exhibit 8; F. 4, App. A, 8a)*. The shipment of 100 drums of calcium hypochlorite which petitioners unsuccessfully sought to establish as the source of the fire was stowed in number one 'tween deck (I, 48a; App. A, 2a, F. 6, 9a).

2. At 5:43 A. M. on May 3 smoke was observed coming out of the fire detection apparatus on the bridge and at the same time flames and smoke were observed coming out of the mast house ventilators leading from both No. 1 and No. 2 compartments (Exhibit D; II, 27b, 28b; F. 4, App. A, 9a). This smoke was the heavy, black ordinary smoke of a general cargo fire, not the peculiar grayish haze characteristic of decomposing calcium hypochlorite (II, 8b, 27b, 44b; App. A, 4a).

3. Twelve minutes later, No. 2 hatch—not No. 1—blew up with such force as to lift two-ton pontoons battened down with tarpaulins and cast the boatswain into the sea (II, 5b-6b, 10b-11b, 24b; F. 4, App. A, 4a, 9a). The fire in No. 2 was more difficult to extinguish and the damage there was about the same as in No. 1 (II, 26b, 29b; Exhibit 5; App. A, 4a).

4. The master was not on the bridge when the fire was discovered (II, 3b). His original report, made just after he had been called from his berth and before he had been forward, referred to the man cast overboard by the No. 2 flame blast (II, 4b, 11b), as did his report to the Coast Guard (Exhibit 20) and to respondent (Exhibit 21). The last report also noted the heavy smoke and flames from the

---

* Petitioners have referred to their Appendix in the Court below as Volume I of the Record here, and to respondent's Appendix in the Court below as Volume II of the Record here. For the convenience of the Court, we shall follow the same system, using "I" for petitioners' Appendix below and "II" for respondent's Appendix below. References to "App. A" and "App. B" are to appendices to the petition. The letter "F" refers to findings of the District Court.

mast house ventilators and the immediate use of CO^2 gas in both No. 1 and No. 2 'tween decks and holds (Exhibit 21).

5. The master, chief officer and general average surveyor, testifying on the basis of all information available to them, said they could not tell where or how the fire started (II, 13b-14b, 30b, 17b-18b; I, 92a).

6. Table E of the Coast Guard Regulations (App. B, 26a) says merely that calcium hypochlorite is decomposed by moisture, or may decompose spontaneously *if* exposed to excessive heat, or to the rays of the sun. *Cf.* Petition, 6. During the voyage before the fire the temperatures had been cool and the skies overcast (Exhibit D; F. 4, App. A, 8a). The calcium hypochlorite was stowed in one of the coolest parts of the ship away from all heat (II, 75b) and her forced draft ventilation system had been in constant operation until outbreak of fire (II, 28b).

7. All witnesses on the stowage, including experts in this field, testified that it was proper and in accordance with the Coast Guard Regulations (53b-56b, 58b, 61b, 62b-65b, 69b-74b, 75b-76b). These Regulations (Table E, App. B, 26a) did not prohibit stowage of calcium hypochlorite with combustibles, as distinguished from that prescribed for a number of other commodities, including calcium chlorite dealt with immediately above calcium hypochlorite in Table E (46 CFR 146.22-100).

8. The only really qualified expert on calcium hypochlorite, the Chief Chemist of the Bureau of Explosives of the Association of American Railroads, testified that calcium hypochlorite decomposes under normal conditions, including temperatures much higher than those encountered on this voyage, at a rate of only about 1 to 5% a year (II, 34b-36b, Exhibit D) and that the drums are commonly fitted with a special gasket to allow the escape of the gases generated by decomposition (II, 39b). Petitioners' chemists agreed that the process of decomposition is "slow" or "gradual" (I, 102a; II, 22b-23b).

9. The Bureau of Explosives Chemist had made tests under conditions simulating those on the SHELL BAR, with calcium hypochlorite in direct contact with combustibles, and was unable to produce fire (II, 36b-38b).

10. The yellow labels prescribed by the Regulations (46 CFR 146.02-10, 146.05-15, 146.05-17)—the only ones which respondent's personnel should be required to direct their attention—were affixed to the drums of calcium hypochlorite. They contained no caution other than to keep away from fire, heat and open-flame lights, to remove carefully the contents of broken packages, and not to drop (Exhibit 16; I, 117a). The trade label, referred to in the petition, p. 7, was plainly a user's label, referring to "Perchloron", a trade name (II, 87b) and giving information as to use of the commodity for various purposes. It included certain warnings to the user, unrelated to stowage on a vessel (Exhibit 17; I, 119a).

11. The 100 drum shipment in question (for which recovery is sought here) was erroneously described by the shipper as "100 drums bleaching powder" (Exhibits 14 and E), but the yellow labels thereon each contained a printed certification in the precise words of § 146.05-11 (II, 117a; Exhibit 16), which was also stamped over the shipper's signature on the inland bill of lading covering consignment to respondent at its pier for ocean transportation (Exhibit 2, answer to interrogatory 2(c) and Exhibit A annexed thereto). *Cf.* Petition, 7.

12. Engagement sheets, prepared by respondent's booking department, incorporating the shipper's description of the commodities and listing separately all labeled cargo, were made available to, and customarily checked by, the stevedore (II, 48b, 88b).

13. Deck cargo lists (Exhibit A) were prepared covering highly dangerous cargo, and "special stowage" lists covering all other cargoes having any element of danger or hazard, as well as some non-dangerous items requiring

special handling. The latter list included the 100-drum shipment here under consideration under Havana cargo (Exhibit 12).

14. The stowage plan (Exhibit 11) reflected small shipments, of which there were many, in blocks indicating the character of stowage and destination. Specifically the 100-drum shipment in controversy was included on the plan in a block of Havana "Special Stow" cargo covering only a very limited area in the after-end of the No. 1 'tweendeck. The Special Stowage list, as well as a Special Cargo list (Exhibit B) and Manifest (Exhibit 8) were always available to those aboard the vessel (II, 78b, 86b), so that a ready cross-reference would show what cargo was loaded in any particular area.

15. The conduct of the master and stevedore was not affected by any lack of documents and both testified that they had adequate information (II, 84b, 86b). The master testified that he knew that yellow label cargo was stowed in No. 1 'tweendeck (II, 59b, 61b). *Cf.* Petition, 9.

16. The layout of the stowage was submitted to and approved by the master (II, 52b) and during loading of the vessel one or more of the ship's licensed deck officers were on duty and delegated to supervise loading of the cargo, including hazardous and dangerous cargo (II, 27b, 59b-60b). *Cf.* Petition, 8.

17. The master intended to have the cargo inspected during the day the fire broke out—the vessel's second full day at sea—in accordance with the Coast Guard Regulations (46 CFR 146.02-12; II, 86b).

18. Copies of the Coast Guard Regulations were made available on the ship (II, 86b) and to all shore personnel concerned with stowage (I, 53a; II, 92b, 98b), and instructions from management were uniformly to comply with them (I, 17a; II, 92b, 98b-99b) *Cf.* Petition, p. 7.

ARGUMENT

I. Reasons for Denial of the Writ:

(1) *This is essentially a fact case.*

The fact question presented to the District Judge by the cargo interests was whether the fire damage on the SS SHELL BAR was caused by respondent's "design or neglect" or "actual fault or privity", as required to permit recovery under the Fire Statute (R. S. § 4282, Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, 46 U. S. C. § 182) or the Carriage of Goods by Sea Act [49 Stat. 1210 (1936), 46 U. S. C. § 1304(2)(b)]. The concurrent findings of the District Court and the Court of Appeals on this basic issue should be accepted by this Court.

> *Coryell* v. *Phipps,* 317 U. S. 406, 411 (1943);
> *Just* v. *Chambers, Executrix,* 312 U. S. 383, 385 (1941);
> *Texas & New Orleans Railroad Company, et al.,* v. *Brotherhood of Ry. & Steamship Clerks, et al.,* 281 U. S. 548, 558 (1930) (citing cases).

The only legal point petitioners seek to raise here is that the "statutory fault" rule announced in *The Pennsylvania,* 19 Wall. 125 (1873) and applied from time to time since in collision and stranding cases, should have been applied in this fire case to satisfy petitioners' statutory burden of proof. But this is academic on the facts found below. *The Salvore,* 52 F. 2d 278, 285 (E. D. N. Y. 1931), *aff'd,* 60 F. 2d 683 (2d Cir. 1932), *cert. den.,* 287 U. S. 653.

Even in collision and stranding cases where the statutory fault rule applies, the Court is "limited to the reasonable probabilities", and where these preclude the statutory infraction having caused the accident, the Court may find

that it was not the proximate cause, without eliminating all possibilities.

Compania de Maderas de Caibarien, S. A. v. *The Queenstown Heights*, 220 F. 2d 120, 122 (5th Cir. 1955);
Seaboard Tug & Barge v. *Rederi, AB/Disa*, 213 F. 2d 772, 775 (1st Cir. 1954);
The Mabel, 35 F. 2d 731, 732 (2nd Cir. 1929);
Cf. The Umbria, 166 U. S. 404, 419 (1897).

Petitioners recognize this limitation by predicating their first and principal question on the assumption that there was a fire "*which may well have been caused* by the carrier's violation of the statute and regulations" (emphasis ours)—an assumption contrary to the decisions of both the District Court and the Court of Appeals (App. A, 7a, 11a).* These decisions, based on *all* the evidence, would prevent consideration of the legal question now sought to be raised by petitioners.

(2) *There is no conflict between circuits.*

Far from conflicting with decisions of other circuits, the decisions below are in strict accordance with the traditional interpretation of the Fire Statute and the Congressional intent which it reflects.

Consumers Import Co. v. *Kabushiki Kaisha*, 320 U. S. 249 (1943);
The Galileo, 54 F. 2d 913, 916 (2nd Cir. 1931), *aff'd sub nom. Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420 (1932);

---

* In finding that "in any event" there was "lack of evidence that any statutory fault was the proximate cause of the fire" (App. A, p. 7a), the Court of Appeals scarcely could have "misapprehended" the statutory fault rule (Petition, p. 16), especially since it had just referred to the "presumption" that that rule, if applicable, may supply (App. A, p. 7a).

The Rio Gualeguay, 102 F. Supp. 861, 865 (E. D. La. 1952), *aff'd*, 205 F. 2d 886 (5th Cir. 1953), *cert. den.*, 346 U. S. 915;

Hoskyn & Co. v. *Silver Line*, 143 F. 2d 462, 463 (2nd Cir. 1944), *cert. den.*, 323 U. S. 767.

The Denali case, 105 F. 2d 413 (9th Cir. 1939), reargued, 112 F. 2d 952 (1940), *cert. den.*, 311 U. S. 687, stoutly relied upon by petitioners, is no more authority for their position than other stranding or collision cases where the statutory fault rule has been applied—some of which are cited at page 14 of the petition. No fire was involved and the Court of Appeals took pains to point out that the burden of proof under the Limitation Statute (R. S. § 4283 as amended, 46 U. S. C. 183) and under the Harter Act (27 Stat. 445 (1893), 46 U. S. C. §§ 190-195) is on the vessel-owner rather than cargo, all of which is of course contrary to the Fire Statute, where cargo has the affirmative burden of establishing that the fire was due to the vessel-owner's "design or neglect" or "actual fault or privity". The testimony in the instant case as to the lack of causal connection would alone distinguish it from *The Denali* (see original opinion, 105 F. 2d 413, 419).

Hines v. *Butler* (*The Virginia*), 278 Fed. 877 (4th Cir. 1921), *affirming* 264 Fed. 986 (D. C. Md. 1920), *cert. den.*, 257 U. S. 659, did not rest on any theory of statutory fault, but on the ground that the loss of cargo by fire was occasioned by reason of the shipowner's proven, not presumptive, "neglect".

Thus no conflict between circuits has been established. On the contrary, the decisions are uniformly in accord with that of the Court of Appeals here.

(3) *Policy considerations are against allowance of the writ.*

The statutory protection of shipowners from liability for fire damage to cargo dates back to at least 1786 in England and to 1851 here. *Consumers Import Co.* v. *Kabu-*

shiki Kaisha, 320 U. S. 249, 254 (1943), n. 12; *Providence, etc., S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 602 (1883).

The statute has been uniformly interpreted by the Courts and understood by shipowners, shippers and insurance interests alike. Investments have been made and risks have been calculated by the interested parties and their insurers on the basis of these interpretations and understandings, which should not at this late date be upset by so drastic a change as the petitioners advocated below and are advocating here.

The Fire Statute was enacted for the definite purpose of protecting shipowners from excessive and unpredictable liabilities for losses to cargo (not loss of life or injury), *Consumers Import Co.* v. *Kabushiki Kaisha* (*The Venice Maru*), 320 U. S. 249 (1943). Nevertheless, contrary to petitioners' suggestion (Petition, p. 3), courts have not been loath to impose liability where requisite facts have been developed. See, *e.g.*, *The Edmund Fanning*, 201 F. 2d 281 (2nd Cir. 1953) and *Great Atlantic & Pacific Tea Co.* v. *Brasileiro*, 159 F. 2d 661 (2nd Cir. 1947), *cert. den.*, 331 U. S. 836, both decided after the *Consumers Import* case. *Cf.* Petition, p. 13.

II. The Petitioners' Questions:

1. *As to Question No. 1:*

For over a hundred years our Courts have consistently resisted attempts to whittle down or dilute the statutory immunity provided by the Fire Statute. By its 1936 enactment of the Carriage of Goods by Sea Act (49 Stat. 1207, 1210 (1936), 46 U. S. C. §§ 1304(2)(b)) Congress not only reaffirmed the protective benefits of the Fire Statute, but extended them to a "carrier", though it might not be a shipowner or owner *pro hac vice*. Against this statutory background the petitioners have failed to cite a single fire case in which the statutory fault principle advocated here

has been applied. Petitioners' argument here was rejected in *The Rio Gualeguay*, 205 F. 2d 886, 888 (5th Cir. 1953), *cert. den.*, 346 U. S. 915.

It is plain that the views advocated by petitioners would emasculate the Fire Statute for they would result in requiring the shipowner to assume the very burden intended by the Fire Statute to be cast solely on the cargo interests. Since the statute itself deals with this burden, the question may not be lightly dismissed, as petitioners would seek to do, by saying that it is one of evidence rather than substance.

Moreover, it is plain that the extension of the statutory fault rule in the manner urged by petitioners would be at odds with the long line of decisions here and in the Courts below. Delinquencies on the part of shipowners, much more serious than the alleged lack of compliance with the Coast Guard Regulations here involved, have been repeatedly held not to relieve cargo interests from satisfying the burden cast upon them by the statute. For example, the shipowner's failure to fulfill his primary and most important duty of making the vessel seaworthy deprives him of defenses provided for by the Harter Act (*May* v. *Hamburg etc. Gesellschaft*, 290 U. S. 333 (1933)), but does not deprive him of his defense under the Fire Statute or even shift the statutory burden of proof. *Hoskyn & Co.* v. *Silver Line*, 143 F. 2d 462 (2d Cir. 1944), *cert. den.*, 323 U. S. 767; *Earle & Stoddart* v. *Wilson Line (The Galileo)*, 287 U. S. 420, 427 (1932). Similarly, a deviation, though regarded as so serious as to strip the shipowner or carrier of bill of lading defenses and make him an insurer, does not deprive him of the Fire Statute protection or lessen the burden of proof cast upon the cargo. *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134, 145 (4th Cir. 1952), *cert. den.*, 345 U. S. 992; *Globe and Rutgers Fire Ins. Co.* v. *United States*, 105 F. 2d 160, 166 (2nd Cir. 1939), *cert. den.*, 308 U. S. 611; *The Ida*, 75 F. 2d 278, 279 (2nd Cir. 1935); see also *Haroco Co., Inc.* v. *The Tai Shan*,

111 F. Supp. 638, 645 (S. D. N. Y. 1953), *aff'd on opinion below*, 218 F. 2d 822 (2nd Cir. 1955); *The Venice Maru*, 39 F. Supp. 349, 353 (S. D. N. Y. 1941), *aff'd*, 133 F. 2d 781 (2nd Cir. 1943), *aff'd sub nom. Consumers Import Co.* v. *Kabushiki Kaisha*, 320 U. S. 249 (1943).

It would indeed be incongruous to grant the statutory immunity to a shipowner guilty of breach of his warranty of seaworthiness or deviation, while denying it to one guilty of non-compliance with some Coast Guard or similar regulation having at minimum no probable causal connection.

2. *As to Question No. 2:*

Petitioners' Question No. 2, not briefed below, is premised upon contentions and assumptions not accepted by the Courts below.

Neither Court found any impropriety in the stowage and there was no factual basis for any such finding since all stowage experts agreed that the stowage was in all respects proper and in compliance with the Coast Guard requirements. There being no impropriety in the stowage under the Regulations or otherwise, no liability can be predicated on the sole basis that the calcium hypochlorite was in the same compartment with other cargo destroyed in the fire and was not isolated from all other cargo on the ship. Under the circumstances, its status was the same as any combustible cargo which could have contributed to the loss in the event of an existing fire.

This case is in no sense comparable to *Hines* v. *Butler*, 278 Fed. 877 (4th Cir. 1921), where the Court found that cargo had succeeded in establishing that the shipowner's "design or neglect" in failing to properly maintain the fire fighting equipment was the direct, and so far as appears, the sole cause of the loss of cargo.

3. *As to Question No. 3:*

Petitioners' Question No. 3 is again related to factual matters upon which there are concurrent findings of two Courts, which should be accepted here.

Conditions on the SHELL BAR up until the outbreak of the fire were not such as to give rise to any fire risks in connection with the item of calcium hypochlorite. The only reliable expert testified, on the basis of actual experiments, that the stowage of that commodity with other cargo in the vicinity gave rise to no special hazards. Indeed, the inference must rather clearly be that the calcium hypochlorite *did not* cause the fire.

References to statements contradicted by others or by actual testimony at the trial and not accepted by the Courts below, are scarcely an appropriate ground for the writ requested. What petitioners seek and sought below is that favorable inferences be drawn from selected items of the record. The Courts below on the basis of the whole record refused to draw such inferences. Any questions of credibility based on any inconsistencies between oral testimony and prior statements were for the Trial Court. *Borcich* v. *Ancich*, 191 F. 2d 392, 395 (9th Cir. 1951), *cert. den.*, 342 U. S. 905 (1952); *The Catalina*, 95 F. 2d 283, 285 (9th Cir. 1938).

As was said in *The Strathdon*, 101 Fed. 600, 606 (2d Cir. 1900): "The occult causes of fire are as numerous as they are mysterious". Since Congress has imposed upon cargo interests a burden which, in this situation, must include proof of the cause of the fire, there is no occasion for speculating as to other causes as consistent, or more consistent, with all of the actual facts than the one singled out by petitioners here.

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

New York, N. Y., September 23, 1955.

BURTON H. WHITE,

HERVEY C. ALLEN,

Counsel for Respondent,
27 William Street,
New York, N. Y.

BURLINGHAM, HUPPER & KENNEDY,
Of Counsel.